ANDAMY PLANTATIONS SDN BHD

v.

TURUS SALADOU & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[ORIGINATING SUMMONS NO: S-24-33-2001]
31 JANUARY 2002

CIVIL PROCEDURE: *Consent order - Setting aside, application for - Native customary rights - Whether court has jurisdiction to hear matter - Whether there was mistake of law when entering consent order*

CIVIL PROCEDURE: *Summary judgment - Land - Rules of the High Court 1980, O. 89 - Whether appropriate mode to commence action*

CIVIL PROCEDURE: *Service - Originating summons - Rules of the High Court 1980, O. 89 r. 4 - Whether complied with*

The plaintiffs commenced an action under O. 89 of the Rules of the High Court 1980 ('the RHC') against the defendants for trespass ('the main action'). The defendants did not deny the plaintiffs' claim but contended that they were entitled to be there, having acquired native customary rights. The parties eventually arrived at an agreement and executed a settlement agreement, which led to the entry of a consent order by the court. It is to be noted that the main action would have been dismissed as O. 89 was not the appropriate mode in the said matter in that there were disputes of facts involved and was therefore not a plain and obvious case.

Subsequently, the plaintiffs applied under O. 89 of the RHC to nullify the consent order *ab initio*, mainly on the premise that the court did not have the jurisdiction to consider and adjudicate any claim for native customary rights over land in Sabah as was relied upon by the defendants in the main action. It was also submitted that the Collector and the Director of Lands and Surveys Department were not made parties to the main action; that the title deed had been issued to the title holder and thus the interest was indefeasible; and that there was failure to comply with the terms of the consent order.

The defendants objected to the plaintiffs' application, arguing that the consent order tantamount to a contract entered into between parties and therefore the plaintiffs ought to be estopped from reneging the terms therein.

Held:

[1] It was erroneous for the plaintiffs to contend that the court had recorded the consent order based on the issue of native customary rights. The question of *res judicata* was therefore irrelevant. Whilst the defendants had raised the issue, it was not considered by the court as the parties had reached an agreement beforehand. (p 206 e-f)

[2] The consent order was not entered based on an erroneous admission of law as alleged by the plaintiffs. Once the parties had entered into the settlement agreement, the court did not proceed to consider whether the reasons for doing so was correct or otherwise. This was the very essence in mediation as an alternative mean to dispute resolution. (p 206 g-h)

[3] The present action indicated an attempt by the plaintiffs to re-litigate a matter which had been settled by the consent order. The plaintiffs intended to get what they had failed to achieve in the main action. Even if it was meant to set aside the consent order, an application under O. 89 of the RHC would not be the appropriate mode to achieve such a purpose. (p 208 c-d)

[3a] The plaintiffs had served the originating summons to the defendants' solicitors. They should have served the originating summons to the defendants as set out in O. 89 r. 4 of the RHC. Therefore the present action should fail. (p 209 c-d)

[4] The plaintiffs were incorrect in contending that the court did not have the jurisdiction to hear matters on native customary rights. In an application under O. 89, the court may consider and rule as triable issue in appropriate cases, a point challenging the procedure adopted. It is a matter of statutory interpretation whether or not a provision in a statute was complied with. (p 210 a)

[5] The Collector and the Director of Lands and Surveys Department need not be made parties to the main action. The action had been commenced by the plaintiffs and not by the defendants. The plaintiffs had agreed to apportion the land in question to the defendants *vide* the consent order and the officials would have to respect the desire of the parties. Thus, there was nothing in the consent order which necessitates enforcement against any of the officials. By the same token, the plaintiffs' contention on indefeasibility of title also failed. (p 210 c-e)

[6] The defendants had provided reasonable justifications as to the plaintiffs' assertion that there was delay and or failure in complying with the terms in the consent order. (p 210 e-f)

[Plaintiffs' action dismissed with costs.]

Case(s) referred to:

Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy Palanimuthu [1982] CLJ 538; [1982] CLJ (Rep) 173 ***(refd)***

Muniandy Thamba Kaundan & Anor v. D&C Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***

Norimah Mohamed & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2000] 3 CLJ 133 ***(refd)***

Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors [1997] 2 CLJ 58 ***(refd)***

Legislation referred to:

Federal Constitution, art. 121
Land Ordinance (Cap 68) (Sabah), s. 13
Rules of the High Court 1980, O. 89 rr. 1, 4

For the plaintiffs - Alex Khoo; M/s Peter Lo & Co
For the defendants - Seibing Gunting; M/s Donald Mojuntin & Seibing Gunting

Reported by M Maheswaran

JUDGMENT

Richard Malanjum J:

By an originating summons dated 3 May 2001 (encl. 3) made pursuant to O. 89 of Rules of the High Court 1980 (RHC) the plaintiffs are applying for the following orders, namely,:

1. that the consent order dated 17th January 2000 in Originating Summons No: S-24-25 of 1998 be set aside;

2. that the settlement agreement dated 17th January 2000 filed in Originating Summons No: S-24-25 of 1998 be declared as void and set aside;

3. that the Defendants and every other persons in occupation of Country Lease No: 085327046, in the District of Labuk & Sugut, Mile 53, Jalan Labuk do deliver vacant possession of the said land on which they occupied to the plaintiffs within thirty days from the date of the order herein on the ground that the plaintiffs are entitled to possession and that the defendants and other persons in occupation are without licence or consent;

4. that the costs of this application shall be paid by the Defendants to the Plaintiffs on a full indemnity basis.

An affidavit affirmed by Lo Chee Kin on 3 May 2001 (encl. 3) (Lo's affidavit) has also been filed in support of the application.

The consent order aforementioned was entered in connection with the action filed pursuant to O. 89 of RHC by the plaintiffs under OS-S-24-25-1998 (the main action) against the same defendants herein.

And the main action was commenced based on the allegation by the plaintiffs that the defendants had trespassed into the land described as CL 085327046 measuring 356.1 hectares (879.9 acres) situate in Mile 53, Labuk Road, in the District of Labuk and Sugut, Sandakan, Sabah (the said land).

There was no denial on the part of the defendants that they were indeed within the boundary of the said land. However their presence thereat was explained in their affidavits in opposition claiming that they were entitled to be there for various reasons, *inter alia*, that they had acquired native customary rights.

In the course of my hearing the matter it was finally admitted that there were disputes of facts involved and as such it was not therefore a plain and obvious case. It was then suggested and agreed by all parties that the action should be tried as a writ action. In hindsight the application could have been dismissed on the basis that O. 89 was not an appropriate mode. In the case of *Norimah Mohamed & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals* [2000] 3 CLJ 133 the Court of Appeal was clear on the application of this order when it said this:

> After carefully considering the arguments addressed to us by counsel, we are satisfied that there is much force in the submissions advanced on behalf of the appellants. In our judgment, the issues identified by En Karpal Singh and En Abdul Razak constitute serious triable issues that are wholly inappropriate for resolution under the summary jurisdiction which O. 89 confers.

Anyway, at the commencement of the scheduled hearing counsel for the parties informed the court that they had settled the dispute and that they had also executed a settlement agreement dated 17 January 2000. It is therefore now an academic question on what would have been the outcome of the trial if it had proceeded.

In view of the representation made I went on to record the consent order in which as dictated by the parties the relevant wordings are as follows:

... By consent it is hereby ordered as follows:

1. That the Defendants herein this action shall be as named in the list enclosed herewith marked "A";

2. That the parties herein shall within 30 days from the date hereof appoint their respective licensed surveyors to conduct a joint survey on C.L. No. 085327046 to determine the total area occupied by the Defendants aforesaid;

3. Thereafter the completion of the said survey, the Plaintiffs shall sub-divide C.L. No. 085327046 into two parts, one representing the total area occupied by the Defendants as surveyed and to be marked as Native Customary Rights land and the remaining thereof as the alienated land of the Plaintiffs;

4. That the Defendants shall vacate the area which is alienated to the Plaintiffs and relocate themselves to the agreed area alienated as Native Customary Rights land within sixty days from the date of the agreed alienation by the parties after the completion of the survey aforesaid;

5. The Plaintiffs shall make all the necessary applications to the Central Land Office and all relevant authorities for the purpose of amending the issued Document of Title of C.L. No. 085327046 to effect the alienation aforesaid;

6. That the parties herein are to bear their own legal costs of this action.

That would have ended the matter if not for this present action. And the grounds advanced by the plaintiffs can be gleaned from Lo's affidavit which has raised the following points *inter alia*:

(a) that there was a mistake of law in relation to the claim by the defendants in the main action for native customary rights (NCR);

(b) that a civil court has no jurisdiction to deal with the issue of native customary rights in respect of land matters;

(c) that the Collector and the Director of Lands and Surveys were not made parties in the main action;

(d) that there is already a title deed issued to the title holder namely, the Koperasi Polis Komponen Sabah Berhad (KOPOSA) and thus the interest is indefeasible; and

(e) that there was a failure to comply with the terms of the consent order.

In his submission learned counsel for the plaintiffs however concentrated on the issue of mistake of law involved in the entry of the consent order and asserting that neither the parties nor the court has the power to rectify it. In other words the jurisdiction of the court is in issue. It was also submitted that the consent order could not be maintained as the Collector was not made a party in the main action. The indefeasibility of the title of the registered owner was also highlighted.

The defendants are objecting to this application and have filed an affidavit in opposition (encl. 6).

Basically the defendants deny the validity of any of the grounds submitted by the plaintiffs. They are saying that the consent order amounts to a contract entered into between the parties and thus the plaintiffs are estopped from reneging the terms therein.

Now, the main thrust of the contention of learned counsel for the plaintiffs is that this court has no jurisdiction to consider and adjudicate any claim for native customary rights over land in Sabah. The defendants had raised such a claim in resisting the main action. It was therefore submitted for the plaintiffs that the consent order was a nullity *ab initio.*

On perusal of the consent order and the notes of proceeding of the main action I do not think the issue of this court adjudicating on the claim arises. The question of *res judicata* is therefore irrelevant. No doubt the defendants raised as one of their defences in the main action the claim for native customary rights. But due to the parties reaching a settlement before the trial could proceed, I did not have to consider the issue at all. Hence it was erroneous to say that this court adjudicated the issue or that the consent order was made based on that issue. It is also incorrect to say that the court acted upon an erroneous admission of law. All that was done by the court in the main action was to record what was agreed by the parties. And I do not think the question of admission of law or misapprehension of the law arises where two adversaries agree to settle their dispute. As such the issue of who is right or wrong in law does not come into the picture when an amicable settlement is reached. It is therefore my view that there is no merit in saying that the consent order was secured on the basis of erroneous admission of law. Once the parties inform the court that an amicable settlement has been reached I do not think it is the business of the court to find out the reason or reasons. Indeed that is the very essence in mediation as an alternative mean to dispute resolution. Thus and with respect I think the plaintiffs in the present action may have not appreciated the significance of the settlement agreement that led to the entry of the consent order. Moreover, although there is a reference

in the consent order to 'native customary land' such phrase is used as descriptive or adjectival words to the area which the plaintiffs agreed to allot to the defendants. In short the plaintiffs agreed to excise from the said land an area to be given to the defendants and that was recorded by the court. And as stated herein the reason for the plaintiffs in agreeing to the consent order is no longer relevant. If it was due to the claim of native customary rights by the defendants then that was the prerogative of the plaintiffs. But it should not be taken that it came from the court or that it was the result of adjudication by the court. There is therefore no question of mistake of law on the part of the court or that the consent order was secured on the basis of mistake of law or such other reason. Pure and simple the plaintiffs agreed to apportion an area of the said land to the defendants and that settled the dispute in the main action.

Indeed to accept the contention of learned counsel for the plaintiffs would mean that the consent order would be annulled and parties would be back to the positions before the filing of the main action except that in so far as this court is concerned the matter has been disposed of. Incidentally this point has not been considered by the parties nor is there any request for the continuation of the main action in the event of the consent order being annulled. And I do not think the present situation can be taken as analogous to where a default or irregular judgment is set aside. There the action would continue from where it had stopped after the impugned judgment was entered. In the present case it is a consent judgment/order entered after the parties have agreed to the terms of settlement of the main action. Of course the other option is for the issue to be re-litigated between the parties. But I do not think it is necessary for me to dwell into such an issue in this case. Accordingly I hold that there is no merit to the assertion that there was an erroneous admission of law when the consent order was entered.

Incidentally, I am quite perplexed by the move of the plaintiffs in this action praying for an order of possession under O. 89 while at the same time saying that it is a fresh action taken and necessary to set aside the consent order. Surely if I were to agree with them then that would be contradicting to the earlier view agreed upon in that there were disputes of facts involved in the main action thereby requiring a hearing. And if the hearing of the main action had gone through at least the defendants would have had the chance to present their version. But that was short-circuited by the settlement agreement. Thus to agree with the present stand of the plaintiffs would in my view be tantamount to allowing the plaintiffs a second bite of the cherry while closing the door on the defendants to ventilate their positions as regards the said land. It would have been a different scenario if the order was granted by the court

and it was a nullity. (See: *Muniandy Thamba Kaundan & Anor v. D&C Bank Bhd & Anor* [1996] 2 CLJ 586). Here the consent order presumably is the product of discussions and agreement between the parties with the benefit of legal advice from their respective solicitors. (See: *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58). Basically therefore the court only recorded what was agreed by the parties. Learned counsel for the plaintiffs submitted that the issue of *functus officio* should not arise since the present action is a fresh action. However I think he has missed the point in that the present action is also based on the same O. 89 which order was used in the main action in respect of the same said land and between the same parties. In other words by the present action it can be said that the plaintiffs are attempting to re-litigate the matter which was settled by the consent order. It is therefore not a true representation that the sole purpose of the present action is to set aside the consent order. In my view it is to get what they failed in the main action. And that I think is not a fair tactic to adopt. Even if the present action is intended only to set aside the consent order I do not think the mode is correct as it is based on O. 89 which essentially deals with summary proceedings for possession of land. Rule 1 of that order reads:

> 1. Proceedings to be brought by originating summons. (O. 89 r. 1)
>
> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

The question of service of an originating summons issued under the said order is also to be noted. Rule 4 thereof states:

> 4. Service of originating summons. (O. 89 r. 4)
>
> (1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him:
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> (a) personally or in accordance with Order 10, rule 5; or
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> (b) by leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or
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> (c) in such other manner as the Court may direct.

(2) The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs, by:

(a) affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises; and

(b) if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers".

(3) Every copy of an originating summons for service under paragraph (1) or (2) shall be sealed with the seal of the Court out of which the summons was issued.

(4) Order 28, rule 3 shall not apply to proceedings under this order.

I did not find any assertion or material before me indicating that the service provision hereinabove has been complied with. In my view service to the solicitors of the defendants is not a compliance with the service provision in respect of an O. 89 application.

Accordingly, for the above reasons as well that this present action should fail.

In passing I think it is incorrect to say that a civil court has completely no jurisdiction to consider a claim for native customary rights in an action involving land. For instance the plaintiffs in the main action was praying for an order of possession which effectively would entail the removal of the defendants from further occupying part of the said land. And the defendants in turn raised the issue that they should be allowed to stay put due to their native customary rights. Surely a civil court should be entitled to consider whether there is any merit to such an assertion for it is only in plain and obvious case that an order under O. 89 of the RHC is granted. (See: *Norimah Mohamed & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals (supra)*). To agree with the submission of learned counsel for the plaintiffs would tantamount to saying that the defendants would not be entitled to raise such an issue when opposing the application. I do not think such a restriction can be placed on the powers of the court. If it is a matter of legal interpretation of certain statutes then that should be the province of the courts. Indeed in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy Palanimuthu* [1982] CLJ 538; [1982] CLJ (Rep) 173 his Lordship Salleh Abas FJ (as he then was) expressed the view that it would be unconstitutional as it would be contrary to art. 121 of the Federal Constitution if an Act were to arrogate the interpretation of a statutory provision to another body other than to the courts.

Accordingly I cannot accept the contention of the plaintiffs as regards the jurisdiction of civil courts pertaining to the issue of native customary rights. I would go so far to say that in an application pursuant to O. 89 the court may consider and rule as triable issue in appropriate case a point challenging the procedure adopted, such as the failure to observe s. 13 of the Sabah Land Ordinance, in the issuance of the title deed in respect of the subject land. And that may result in a finding that the matter is not one of plain and obvious case and that the said order is therefore inappropriate in the circumstances. It is a matter of statutory interpretation whether or not a provision in a statute has been complied with. Hence, the jurisdictional point as raised by the plaintiffs fails.

Next, it was contended that the Collector and the Director of the Lands and Surveys Department should have been made parties in the main action. My short answer is that the main action was commenced by the plaintiffs and not by the defendants. Further, the inclusion of those officials would not have made any difference in the effectiveness of the consent order as it encapsulated the agreement of the plaintiffs to apportion part of the said land to the defendants and such officials would have to respect the desire of the parties. There is no question of any part of the consent order requiring enforcement against any of the officials. It is similar to a situation where a registered owner of a parcel of land transfers a portion of his land to another person. Thus, the foregoing contention fails as well. And by the same token the argument on indefeasibility of title is also defeated.

As for the assertion that there was a delay or failure in complying with the terms of the consent order, I have perused the explanation of the defendants and I am satisfied that it is reasonable in the circumstances. I think this present action speaks volumes of what the plaintiffs had in mind after the consent order was entered.

I have also considered the other issues raised in this present action and I do not think it is necessary for me to deal in depth with all of them. It would be sufficient to say that they have not managed to alter my views as expressed hereinabove.

It is therefore my conclusion that for the foregoing reasons this present action should be dismissed with costs to the defendants to be taxed unless agreed.